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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 903

BRODERICK AND BASCOM ROPE COMPANY, a CORPORATION,

Petitioner,

vs.

EUGENE MANGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE SUNNYSIDE-SEARSON PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner Broderick and Bascom Rope Company, a Corporation prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported in 351 F. 2d 24. It is printed in the Appendix A, *infra.* The judgment of the Court of Appeals is in Appendix B, *infra.*

JURISDICTION.

The judgment of the Court of Appeals was entered July 27, 1965. Petitioner's timely petition for rehearing was denied October 18, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED.

I.

Was Rule 36 of the Rules of Civil Procedure intended to be used to create liability where there is none?

1A. Did the District Court upon the trial have discretion to allow petitioner's answer to respondent's interrogatory under Rule 33 stand as an answer to respondent's request under Rule 36 for an admission that a 6 x 7 cable had been delivered upon an order for a 6 x 37 cable?

1B. Where petitioner under oath in answers under Rule 33 had twice stated that 6 x 37 cable was the cable delivered, giving the day and place of delivery, the position and name of the employee who made delivery?

1C. Where the requested admission was not relevant upon the filing and only became relevant when respondent upon the trial changed his charge from negligent manufacture and sale of a defective cable to a charge of erroneous delivery of a 6 x 7 cable upon an order for a 6 x 37?

1D. Where respondent and his counsel knew before filing the complaint the cable which broke was 6 x 7, that the case would be an alleged delivery of 6 x 7 cable upon an order for 6 x 37, and withheld the actual charge until after the trial began in violation of Rule 11?

1E. Where the request designated no period within which answer was to be served as required by Rule 36 and specified in the statutory form?

1F. Where petitioner had moved for an extension of time in which to answer the request for admissions and the court had taken the motion under advisement and the motion remained pending?

II.

The Court of Appeals in this case, in which jurisdiction is grounded on diversity of citizenship, refused to follow the ruling in *Mokrzycki* v. *Olson Rug Co.* (1960), 28 Ill. App. 2d 117, 170 N. E. 2d 635, of an Illinois appellate court. As we shall demonstrate under "Reasons For Issuance of The Writ," there is not an Illinois decision—not even an Illinois dictum—contrary to that decision. The question is whether in refusing to follow the rule of law announced by the state court, the Court of Appeals failed to apply the state law within the requirement of section 1652, Title 28, U. S. C. 1958, page 5046, and this court's decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

III.

After the jury had reported a disagreement, the trial judge gave an instruction patterned after the instruction in *Allen* v. *U. S.* (1896), 164 U. S. 492 at 501. The Court of Appeals rejected the holding of *Allen* v. *U. S.* and other federal cases following *Allen* v. *U. S.*

In a diversity case, isn't the question of the compulsion of the jury a question of federal law? Wasn't the Court of Appeals in error in rejecting *Allen* v. *U. S.* and the other cases in line with that decision?

STATUTES INVOLVED.

U. S. C. 1958 Ed., page 5137, Title 28, Rule 11:

Rule 11. Signing of Pleadings.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

U. S. C. 1958 Ed., page 5160, Title 28, Rule 36:

Rule 36. Admission of Facts and of Genuineness of Documents.

(a) *Request for Admissions.* After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of

the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

U. S. C. 1958 Ed., page 5220, Title 28, Form 25:

Form 25.—*Request for admission under Rule 36.*

Plaintiff A. B. requests defendant C. D. within ..... days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Signed: .....

Address: .....

Attorney for Plaintiff.

U. S. C. 1958 Ed., page 5046, Title 28, Sec. 1652:

SEC. 1652. *State Laws as Rules of Decision.*

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. (June 25, 1948, ch. 646, 62 Stat. 944.)

STATEMENT OF CASE.

Respondent sued petitioner for injuries suffered December 1, 1960, when a wire cable broke permitting a concrete panel to fall and injure respondent. Jurisdiction in the District Court was based on diversity of citizenship. Respondent is a citizen of Illinois.* Petitioner is a citizen of Missouri (Res. A. 2). The jury returned a verdict for petitioner. The judge denied respondent's post-trial motion. The Court of Appeals reversed.

The Court of Appeals held the trial judge erred in the following:

(1) The trial judge had allowed petitioner's answer to an interrogatory under Rule 33 of the Rules of Civil Procedure to stand as an answer to a request for an admission under Rule 36.

(2) In keeping with the holding in *Molrozycki* v. *Olson Rug Company* (1960), 28 Ill. App. 2d 117, 170 N. E. 635, petitioner had been permitted to show before the jury that the witnesses who testified for respondent were employed by Wm. E. Schweitzer & Co., respondent's employer, and that Wm. E. Schweitzer & Co. would share any recovery to the full extent of all sums paid to or for respondent under Illinois Workmen's Compensation Act. The Court of Appeals disagreed with the decision.

---

* Mary Mangan, respondent's wife, a plaintiff (Res. A. 2) had the complaint dismissed as to her (Res. A. 21).

(3) The judge had erred in giving to the jury after they had deliberated an instruction patterned after the instruction in *Allen* v. *U. S.*, 164 U. S. 492 at 501.

FACTS.

We shall designate respondent's appendix in the Court of Appeals by (Res. A. ——). We shall refer to petitioner's appendix attached to petitioner's brief in the Court of Appeals by (Pet. A. ——).

On Monday, November 14, 1960, sixteen days before the accident, respondent's employee Hines delivered a coil of wire rope to Wm. E. Schweitzer & Co. at O'Hare Airport (Res. A. 489-490). Wm. E. Schweitzer & Co.'s man Arthur Johnson, who had placed the order, receipted for

> "50 ft. of 6 x 37 Yellow Strand Reg. F. C." (Pet. A. 13, Plf. Ex. 9B: Res. A. 130-131).

One could tell yellow strand because it is yellow (Res. A. 494).

There is no evidence that this cable delivered Monday, November 14, 1960, sixteen days before the accident, was ever placed in either shanty where Schweitzer kept its cable.

What was done with the cable after Johnson receipted for it is purely a matter of speculation.

There is no evidence connecting the cord which broke with petitioner. The evidence is unmistakably clear that the cable which broke was not petitioner's cable.

William Olsen, vice president of Schweitzer & Co., in charge of construction (Res. A. 225-226) in November, 1960 marked ½" 6 x 37 cable as shown in petitioner's catalogue (Res. A. 229-231). (The ½" denotes the diameter of the cable. The "6" tells the number of strands. The "37" indicates the number of wires twisted into each strand.) He

gave the catalogue to Arthur Johnson, the timekeeper for Schweitzer Co. (Res. A. 230-231). He directed Arthur Johnson to order from petitioner 50 feet of ¼" 6 x 37 Yellow Strand Reg. F. C. (Res. A. 244). Arthur Johnson placed the order pursuant to Olsen's direction (Res. A. 237).

On Friday, November 11, 1960 the order for 50 feet ¼" 6 x 37 Yellow Strand, Reg. F. C. was received by the petitioner (Pet. A. 11, Def. Ex. 4, Res. A. 517-518). Petitioner was to deliver the wire rope to O'Hare Airport Building 9. The order was numbered "2596". The order is dated 11-11-60 (Pet. A. 11). The delivery ticket is dated November 14, 1960 (Pet. A. 13). On the delivery ticket for 50 feet ¼" 6 x 37 Yellow Strand Reg. F. C. (Pet. A. 13) the "W. E. S. Co." means Wm. E. Schweitzer Co. The "F. 8" indicates the account. The "Precast" and "A. J." are in the handwriting of Arthur Johnson (Res. A. 130-131). The cable was coiled, it was not wrapped (Res. A. 494).

On November 14, 1960, petitioner sent an invoice covering 50 ft. ¼" 6 x 37 Reg. F. C. Yellow Strand. The invoice bears the identifying number, 2596, placed on the order (Plf. Ex. 9A, Pet. A. 11). Petitioner produced its record of sales (Res. A. 548-9). It shows the date, the order number, and description of the cable:

Date	Order
11-14	2596

Description: ¼" 6 x 37 Yellow Strand Reg. F. C. (Pet. A17).

No witness other than Hines, who made delivery, claims to have seen the cable after it left petitioner's warehouse on Monday, November 14, 1960, sixteen days before the accident.

For four or five weeks (Res. A. 175) respondent, as an employee of William E. Schweitzer & Co., general contrac-

tor, with four co-employees (Res. A. 86) had been installing precast concrete panels in building No. 9 at O'Hare Field, Chicago (Res. A. 175). A panel weighed about 3,000 pounds (Res. A. 247). They would wrap a cable around a panel, and fasten the cable in a hook suspended from a crane. The crane lifted the panel. The workers, by means of a rope, guided it into place (Res. A. 98-101).

They installed twenty-four to twenty-six panels a day (Res. A. 285).

After each installation, the cable was inspected to determine whether a change of cable was necessary (Res. A. 237). When a cable was no longer fit for use it was replaced (Res. A. 174).

New cables were delivered to the job site either to the ironworkers' shanty or to the field shanty (Res. A. 585). When a change of rope was determined respondent or his co-worker, Mr. Deacy, would go and fetch one from the ironworkers' shanty (Res. A. 179). Respondent testified:

> Q. And is it a fact that they were replaced as frequently as every third or fourth panel?
>
> A. It depends, if the rope was perfect, it would not be replaced (Res. A. 174).

Mr. Deacy, a co-employee, stated that the cable might be used to lift six to seven or maybe eight panels before it was replaced (Res. A. 284, 285).

On the morning of Dec. 1, 1960, they had installed about three panels (Res. A. 180). About 9:30 A. M., respondent went to the ironworkers' shanty to pick up a cable. He brought a cable he found hanging on a nail in the shanty. He and co-employee, Frank Deacy, wrapped the wire cable around a panel. They put clamps on it. They signaled the crane operator. While the panel was being lifted into place, the wire cable broke, and the panel fell, injuring respondent (Res. A. 102 to 104).

Respondent testified:

"Q. When you went to get the rope, where did you find it?

"A. It was in the shanty." (Res. A. 176.)

"Q. Where do you keep the rope in the shanty?

"A. Kept on nails in the shanty." (Res. A. 177.)

When asked what was the greatest number of ropes that he saw in the shanty respondent testified:

"I don't remember how many, I would say . . .

"The Court: One, two, three.

"The Witness: *It depends on the order that they came in. They would order only so many at one time,* probably, Your Honor.

"Q. Well, what is the maximum number you would say?

"A. *Probably there would be two or three.*" (Res. A. 177.) (Emphasis by us.)

On pretrial deposition respondent testified:

"Q. Did you ever see these cables delivered up to this shanty?

"A. Yes, I have seen them being delivered in there.

"Q. *Was the cable which you went to get before from the shanty, just before this accident, one of those that was delivered with the cables that you had previously used?*

"A. *Yes, it was one of the group that was brought there.*" (Res. A. 195.) (Emphasis by us.)

"Q. *Do you know how long that cable had been in the shanty, the one you went to pick up?*

"A. *I don't know. He brought in several cables, and this was the last one.*" (Res. A. 197.) (Emphasis by us.)

William Pische, an engineer, job superintendent on the project for Wm. E. Schweitzer Co., went to the scene of the accident at about 10:30 on the day of its occurrence (Res. A.305-309). The day following, he counted the strands

and the number of wires in each strand making up the broken cable. He determined that the cable was 6 x 7 wire rope (Res. A. 307).

William Pischke testified:

"Q. . . . the first place you saw the wire was at the ironworkers' shanty?

"A. No, sir.

"Q. Then I misunderstood you?

"A. At the scene of the accident. (Res. A. 312.)

"Q. Did you not see this wire cord before the accident?

"A. That is correct, sir". (Res. A. 322.)

After petitioner's proofs were closed, William Pischke was recalled. He testified:

In the interval between November 3, 1960 and December 1, 1960, cable was delivered "to the job site, either to the shanty or the field shanty." (Res. A. 585.)

He saw cable in the ironworkers' shanty. He was not able to tell who manufactured it by looking at it (Res. A. 586).

A piece of cable 50 foot length delivered November 3, was used (Res. A. 586).

Q. Directing your attention to a period of about ten days before the occurrence, did you have occasion to be in that shanty?

A. Yes, sir.

Q. Would you tell us how many new cables you had in there?

A. One.

Q. How was that cable kept?

A. It was in a coil (Res. A. 587).

Q. Were you there when it came in?

A. No, sir, I was not.

Q. Do you know whether or not you had any new cable other than the one which you saw about ten days prior to the occurrence?

A. No, sir (Res. A. 588).

After the occurrence he had occasion to examine the quarter-inch wires on the concourse job (Res. A. 589).

He did not find any 6 x 37 one-quarter inch wire on that job (Res. A. 590).

Walter Lempke, the ironworker's foreman for Schweitzer, had charge of seeing that there was a supply of cable for installing panels. At the time of the trial he was still employed by Schweitzer (Res. A. 311). He was not called as a witness (Res. A. II-IV).

Arthur Johnson, who ordered the wire rope from petitioner and who receipted for "50 ft. ¼" 6 x 37 Yellow Strand Reg. F. C." (Pet. A. 13) on behalf of Schweitzer, was not called as a witness (Res. A. II-IV).

The Cable Which Broke Was Not Produced.

On February 19, 1961, Richard Borchardt took the broken cable to Kawin Laboratories and had it tested (Res. A. 378-379).

Russell J. Dixon, on behalf of petitioner, examined the broken cable about the middle of June, 1962 in the offices of Mr. Borchardt, the investigator (Res. A. 527). There were four pieces which totaled 39 feet in length (Res. A. 528-529). He testified that by examining the broken cable, he could tell that it was not made by petitioner (Res. A. 541). He had a photographer make photographs of the broken cable. Three photographs are in petitioner's Appendix (Pet. A. 14-16).

Mr. Borchardt, the investigator, testified:

> After the cable had been examined by Mr. Dickson it remained in his office.
>
> It was disposed of by the cleaning woman, Marie Weiss, who cleans their office; she threw it out (Res. A. 328).

Marie Weiss testified that in cleaning the offices of Mr. Boyer, employer of Mr. Borchardt, she saw some wire on the table and put it in the elevator with papers (Res. A. 403). The cable which she removed was about four feet long. The wire was old, something like a black wire (Res. A. 406-407).

THE CHARGE THAT PETITIONER HAD NEGLIGENTLY SUPPLIED A CABLE DIFFERENT THAN THAT ORDERED WAS WITHHELD UNTIL AFTER THE CASE WAS ON TRIAL.

Respondent's complaint filed June 20, 1961 charges negligence in the manufacture, failure to test, sale of a defective cable, failure to warn that cable was unfit, and breach of warranty (Pet. A. 2-3). An amended complaint, filed September 22, 1961, repeated the charges without change, except the breach of warranty was omitted (Res. A. 3-4). Neither alleged delivery of a cable different than that ordered.

After the jury had been sworn to try the case, in his opening statement, respondent's counsel first disclosed that his case against petitioner was based upon an alleged delivery of a 6 x 7 cable upon an order for a 6 x 37 cable (Res. A. 65-66, Res. A. 67).

On March 2, 1964 respondent amended his complaint at the close of proofs so as to charge petitioner had negligently supplied a cable different than that ordered (Res. A. 25).

INTERROGATORIES AND REQUESTS FOR ADMISSIONS.

On August 23, 1962, respondent filed a request for 14 admissions. Number 5 is the one material:

"(5) The wire rope sent Wm. E. Schweitzer & Co. was composed of six strands with seven wires in each, or 6 by 7 wire rope." (Res. A. 11.)

The request did not specify the period in which answer was to be made (Res. A. 10-12).

On September 4, 1962, petitioner filed a motion:

> "to be relieved from answering plaintiff's requests for admissions of facts Nos. 11, 12, 13, and 14 *and for an extension of time to answer the balance of admissions not objected to for the following reasons:*" (Res. A. 12.)

On September 10, 1962 petitioner brought up its motion of September 4. Upon being told the requests were filed August 23, 1962, the court said:

> "You appreciate, do you not, Counsel, that this case is on the call tomorrow morning? While we might not reach it for trial tomorrow morning, why do you delay? You file these papers so often at the last moment. You have got to give counsel a chance to—." (Res. A. 665-666.)

Referring to the objections to requests for admissions and for an extension of time, the court said:

> "I will take both these motions and let you know." (Res. A. 666.)

Later that same day, September 10, 1962, the Court ordered:

> "Objections of Defendant to Plaintiff's request for admissions of fact sustained. Cause held on trial call until October 15, 1962, at 10 A. M." (Res. A. 15.)

Petitioner's motion for an extension of time to answer the balance of the requested admissions was left pending.

On September 10, 1962, the Court gave petitioner leave to answer respondent's interrogatories under Rule 33 (Res. A. 667).

Petitioner's answers then filed September 10, 1962, covered minutely respondent's request #5 for an admission

under Rule 36. It stated that the product delivered was one-quarter inch 6 x 37 yellow strand wire rope (Res. A. 14).

It stated an order sheet was filled out and a copy of same has been furnished respondent. (Note: The order sheet is Def. Ex. 4 (Pet. A. 11).)

It also stated a delivery sheet was filled out and a copy of same has been furnished respondent (Res. A. 14-15). (Note: This delivery sheet is Plf. Ex. 9B (Pet. A. 13).)

These answers were verified by Russell J. Dickson, district manager of petitioner (Pet. A. 10).

Later, respondent served other interrogatories again covering the delivery by petitioner of wire rope covered by respondent's requests of August 23, 1962.

On August 8, 1963, in a sworn answer to an interrogatory, petitioner again stated:

> "Charles Hines delivered 50 feet of ¼" 6 x 37 yellow strand wire rope to Wm. E. Schweitzer Company at O'Hare Field on November 14, 1960" (Res. A. 16-17).

In allowing petitioner's answer under Rule 33 to stand as an answer to request #5 the District Judge said the case should be tried on the merits, not on a technicality (Res. A. 418).

REASONS FOR GRANTING THE WRIT.

PRELIMINARY.

Though the Court of Appeals remanded the case for a new trial, this Court should take jurisdiction because this application for certiorari involves issues fundamental to the further conduct of the case.

In *United States* v. *General Motors* (1945), 323 U. S. 373 the question was as to the admissibility of items of damages in a condemnation suit. The Court of Appeals reversed and remanded for a new trial. This court said, page 377:

> "We think we should review the ruling inasmuch as it is fundamental to the further conduct of the case."

In *Simler* v. *Conner* (1963), 372 U. S. 221, the Court of Appeals had reversed and remanded for a trial before the court without a jury. This court allowed certiorari, reversed and remanded for a trial before the court and a jury.

I.

Rule 36 of the Rules of Civil Procedure is applied constantly in the District Courts. Uniform construction is of paramount importance. Rule 36 has not been but should be construed by this court.

What was said in *Schlagenhauf* v. *Holder* (1964), 379 U. S. 104 at 112 is applicable:

> "* * * in this instance the issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us (this Court) to determine on the merits the issues presented and to formulate the necessary guidelines in this area."

On August 23, 1962 respondent requested 14 admissions under Rule 36. The following number 5 only is in question.

> "(5) The wire rope sent Wm. E. Schweitzer & Co. was composed of six strands with seven wires in each, or 6 x 7 wire rope." (Res. A. 11.)

On September 10, 1962 petitioner filed answers to interrogatories under Rule 33 covering the above number 5 in minute detail:

Interrogatory 4:

State whether or not the defendant sold a piece of wire rope ¼ inch in diameter to the plaintiff's employer Schweitzer Construction Company in November, 1960 and if so, state (a) Who received the order and how it was placed, either by writing or telephone; (b) Who filled the order; (c) Who delivered the product; (d) The description of the product delivered.

Answer: Yes; (a) The defendant received the order on the telephone; (b) Warehouse personnel of the defendant; (c) The defendant delivered it; (d) ¼ inch 6 x 37 yellow strand wire rope.

Interrogatory 5:

If the answer to the prior question is in the affirmative, state whether or not there was an order sheet filled out and if so who has possession of it at present.

Answer: Yes and a copy of same has been furnished the plaintiff. (Note: The order sheet is Def. Ex. 4 (Pet. A. 11.)

Interrogatory 6:

State whether or not the defendant had a delivery sheet or any other memoranda indicating delivery of a piece of wire rope in November, 1960 to Schweitzer & Company employees at O'Hare Field.

Answer: Yes and a copy of same has been furnished the

plaintiff (Res. A. 14-15). (Note: This delivery sheet is Plf. Ex. 9B (Pet. A. 13).)

These answers were verified by Russell J. Dickson, district manager of petitioner (Pet. A. 10).

Respondent afterwards served other interrogatories under Rule 33 and petitioner on August 8, 1963 filed a sworn answer again covering request #5:

2. State whether or not Charles Hines was employed in any capacity by the defendant and if so state:

(a) what his capacity was for a six-month period prior to the date of the incident alleged in plaintiff's complaint;

(b) whether he had anything to do with the delivery of any wire rope to the employer of the plaintiff and if so, the times and dates of said deliveries, where the deliveries were made, to whom he made deliveries and where he placed the product delivered.

Answer: Yes.

(a) Sales Trainee.

(b) Yes. Charles Hines delivered 50 feet of ¼" 6 x 37 yellow strand wire rope to Wm. E. Schweitzer Company at O'Hare Field on November 14, 1960 (Res. A. 16-17).

The holding of the 7th Circuit that the trial judge had no discretion is in irreconcilable conflict with decisions of the 9th and 5th Circuits.

In *Bowers* v. *J. E. Rose Mfg. Co.* (1945, 9th Cir,), 149 F. 2d 612, 614-615 the request became mislaid and mixed with other papers. The mistake was not discovered until motion for summary judgment, when answer was made in response to the motion. The district court struck the answer. In reversing the judgment the Court of Appeals held, page 615,

that since said answers sufficiently denied the requested admissions, the Court was in error.

> "We think it was an abuse of the Court's discretion so to strike the answers."

In *Woods* v. *Horton* (1948, 5 Cir.), 171 F. 2d 544, the defendant filed an unverified denial. The trial judge held the unverified denial effective. The Court of Appeals reversed. It held that since the failure to verify the denial was because of a misunderstanding and defendant in good faith asserted as defense, the defendant should be given a reasonable time to make a proper answer.

The rule expressly provides that the court may extend the time for answer. It does not exact that application to be made within the time specified in the request.

In *Schuett* v. *Hargems* (1962), 173 Neb. 663, 114 N. W. 2d 508, 510 under a statute identical to Rule 36 the trial court overruled a motion for summary judgment for failure to answer and allowed defendant ten days to answer. This was assigned as error in the Supreme Court. The Supreme Court said,

> "Here an application for additional time was made after the time limited by plaintiff had expired. The court upon proper showing so set to extend the time. This was clearly within the court's discretion." Page 510.

In *Snyder* v. *St. Paul Mercury Indem. Co.* (1945, Tex. Civ. App.), 191 S. W. 2d 107, plaintiff's attorney made a request for admissions on May 30, 1942 under a similar statute. In January, 1945, when the case came on for trial, defendant's attorney filed a sworn motion to quash the request. The Court denied the motion but allowed defendant's attorney leave to answer. The Court stated that under the terms of the rule the trial judge could extend the time.

The charge of misdelivery was withheld until after the trial had begun.

The withholding of the charge that petitioner had supplied a cable different than that ordered until after the case was on trial was sufficient ground for the District judge to allow petitioner's answer under Rule 33 to stand as an answer to respondent's request #5 for an admission under Rule 36.

On December 2, 1960, the day following the accident, William Psykes, superintendent of Schweitzer examined the broken cable, counted the wires and determined it was 6 x 7 cable (Res. A. 307).

On February 19, 1961, Richard Borchardt, whose employer was hired on the day of the occurrence to investigate the accident (Res. A. 372) delivered the broken cord to a metallurgist to have it tested (Res. A. 378). Borchardt received the rope back after several weeks (Res. A. 379).

M. F. Surls, metallurgist, made a report. He tested the chemical composition, the tensile strength of the rope, and the individual wires (Res. A. 439).

He counted the number of strands and the number of wires. It consisted of six strands; each strand was made up of seven wires (Res. A. 443).

He made a comparison of the breaking strength of 6 x 37 yellow strand and the breaking strength of the 6 x 7 (Res. A. 462).

Respondent's complaint was afterward filed June 21, 1960. No charge was made that petitioner had erroneously sent ¼ inch 6x7 cable upon an order for ¼ inch 6 x 37 Yellow Strand.

The Complaint charged:

> "5. That* * * the defendant knew or * * * should have known of the purpose for which the steel cable was to be used and it * * * was the duty of the

defendant to supply and manufacture a steel cable * * * that would be suited for the purpose intended, and the defendant did* * * so * * * negligently manufacture the said steel cable * * * so that the same was caused to and did * * * break and it was * * * unfit for the purpose for which it was intended.

6. That * * * defendant was * * * guilty of one or more of the following wrongful acts:

a. Carelessly and negligently manufactured a certain steel cable or rope and as a direct and proximate result thereof the plaintiff was injured;

b. Carelessly and negligently failed to test the said rope or cable to determine its suitability for the purposes intended, and as a direct and proximate result thereof the plaintiff was injured;

c. Carelessly and negligently sold and provided a cable which was defective in character;

d. Carelessly and negligently failed to warn the plaintiff that the said cable or rope was unfit for the purpose for which it was intended;" (Res. A. 2-3).

Respondent filed on September 22, 1961 an amended complaint. He repeated without change the above charges (Res. A. 3-4).

He made no mention of delivery of a cable different than that ordered.

On March 2, 1964 just before the court instructed the jury, respondent substituted for the above paragraphs 5 and 6 the following:

"5. That the defendant carelessly and negligently fulfilled an order so that a cable of inferior strength was supplied and the said cable broke while being used for the purpose for which it was intended, and as a direct and proximate result thereof the plaintiff, Eugene Mangan, sustained injuries.

6. That at the time and place aforesaid the defendant was then and there guilty of one or more of the following wrongful acts:

a. Carelessly and negligently supplied a cable different than that ordered;

b. Carelessly and negligently sold a cable unfit for the purpose for which it had been ordered;

c. Carelessly and negligently failed to warn the plaintiff, Eugene Mangan, that the said cable was unfit for the purpose for which it was intended." (Res. A. 25).

On February 24, 1964 in his opening statement to the jury, respondent's counsel for the first time, disclosed that his case was based upon a delivery of a 6 x 7 cable upon an order for a 6 x 37 and upon that alone. He stated:

"This order was placed with Broderick and Bascom to deliver to the Schweitzer job one-quarter inch 6 x 37. The order was placed November 11, 1960.

"They had a man by the name of Charles Hines • • • deliver this particular material on November 14, 1960.

"The material that was delivered was one-quarter inch cable, but it was not 6 x 37 (Res. A. 66).

"After the occurrence it was found that the cable which had been delivered was not the cable which had been ordered, but on the contrary, it was quarter inch, 6 x 7 cable.

" • in other words, it was what is known as a tiller cable in the catalogue of Broderick and Bascom, and of course, was unable to handle the load of the panel." (Res. A. 67).

Hence, the charges of negligent manufacture, negligent failure to test, negligent sale of a defective cable and negligent failure to warn were inserted in the complaint in violation of Rule 11.

Rule 11 provides:

"The signature of an attorney constitutes a certificate by him that he has read the pleading and to the best of his knowledge, information and belief, there is good ground to support it."

The opening statement of respondent's attorney shows that a charge of misdelivery was the only basis he had for a claim. (Res. A. 65-66, 67).

Hence, the request for admission #5 that petitioner had delivered 6 x 7 rope upon an order for 6 x 37 first became relevant after the case was on trial. On this ground alone the District Court in its discretion could properly give petitioner leave to answer the request at that point.

The rules were promulgated for the purpose of having cases tried upon their merits not upon a hypertechnical rule. Rule 36 gives the District judge power to extend the time for filing. It does not require that application be made within the time specified in the request. According to the rule, the District judge could extend the time after time for filing had lapsed.

The complaint and amended complaint were filed by counsel knowing that he had no ground to support the charges. When he changed the charge from negligent manufacture and delivery of a defective cord to a charge of misdelivery of a 6 x 7 cord upon an order for 6 x 37 cord, the court could allow petitioner to answer request #5. Up to that point, #5 was not relevant.

No Period Was Designated.

Respondent's request for admissions nowhere designated the time within which the admissions were to be made (Res. A. 10-11). The rule specifies that the other party may answer "within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow". The rule further provides that if objections to any part of the request are made, "the remainder of the request shall be answered within the period designated in the request."

Petitioner objected to part of the request. There was no "period designated in the request." Under the wording of the rule, the time didn't run.

The statutory form in keeping with Rule 36 provides for a specification of the period within which the admissions are to be made.

U. S. C. 1958 Ed., page 5220, Title 28, Form 25:

> "Form 25.—*Request for admission under Rule 36:*
>
> "Plaintiff A. B. requests defendant C. D. within ..... days after service of this request to make the following admissions * * *."

In *Schlagenhauf* v. *Holder* (1964), 379 U. S. 104 at 121 while considering Rule 35 the court aptly said:

> "The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations." Page 121.

There was no compliance with Rule 36's requirements that the time in which to answer be stated.

There was no compliance with the requirement that the matter be "relevant."

Request #5 became "relevant" after respondent changed his charge from negligent manufacture and sale of defective cable to delivery of 6 x 7 cable upon an order for 6 x 37.

In *Campbell* v. *Blue* (1955), Fla. 80 So. 2nd 316, the court construed a Florida Statute identical to Rule 36.

On February 26 plaintiff filed request for admissions but failed to state any time in which the defendant was to answer. Twenty-two days later defendant filed objections.

On May 13 defendant filed an affidavit in answer to the request for admissions. The trial court rendered summary judgment for the plaintiff.

Reversing the judgment the Supreme Court held P. 317:

> "In the absence of any fixed time for answer there was no obligation on defendant to answer. The penalties of the Rule may not be visited on defendant for plaintiff's failure to specify a time within which admissions were required to be filed." (P. 317.)

In *Morris* v. *Wm. J. Duggan Co.* (1942), D. C. Mass., 3 FRD 39 plaintiff in his request designated no time. The court held that under Rule 36 a party requesting admissions was required to designate the time for answer. The court said that if the plaintiff should amend his request in this regard and designate the time within which the admissions were required, then defendant could either deny under oath or set forth in detail the reasons he could not truthfully admit or deny the matters.

In *Thos. French & Sons Ltd.* v. *Carleton Venetian Blind Co.* (1940, D. C. N. Y.), 1 F. R. D. 178, plaintiff moved to dismiss defendant's request for admissions of fact on two grounds: (1) no time was specified for answer; (2) they should be limited to matter within the party's knowledge.

The court held that it had power to fix a time and ordered that plaintiff be given 10 days from the date of the hearing.

If the provisions of Rule 36 and of the statutory form for fixing a period are to be eliminated, it should be by decision of this court.

If a slip or oversight of counsel under Rule 36 requires imposition of liability where otherwise there is none, then there should be literal compliance with the wording of the rule.

II.

Jurisdiction in the District Court was based on diversity of citizenship. The District Court was bound to apply Illinois law.

William E. Schweitzer & Co., respondent's employer, was not covered by insurance (Res. A. 423). Under Illinois law Schweitzer has a substantial interest as an unnamed plaintiff. It was paying and was bound to pay workmans compensation, *Sjoberg* v. *Jos. T. Ryerson* (1956), 8 Ill. App. (2) 414, 132 N. E. (2) 56; *Legler* v. *Douglas* (1960), 26 Ill. App. (2) 365, 167 N. E. (2) 813.

Respondent's witnesses in the District Court were either regular employees of Wm. E. Schweitzer & Co. or had been employed by Schweitzer & Co. in the matter about which they testified. The District Judge in his ruling that petitioner had a right to show the interest of the witnesses by showing that they were or had been employees of Wm. E. Schweitzer & Co., and that Wm. E. Schweitzer & Co. would recover all of the money which it had been or in the future would be required to pay either for medical or workmen's compensation followed *Mokrzycki* v. *Olson Rug Co.* (1960), 28 Ill. App. 2d 117, 170 N. E. 2d 635 (Res. A. 368, 371).

In *Mokrzycki* v. *Olson Rug Co.* (1960), 28 Ill. App. 2d 117, 170 N. E. 2d 635, plaintiff sought to recover for injuries suffered in the course of his employment by Globe Roofing Products Company. On cross-examination plaintiff's witness Pearl, Globe's plant superintendent, was asked over plaintiff's objection if he or his company had any financial interest in the outcome of the litigation. He was also asked whether his company stood to recover thousands of dollars paid in workmen's compensation. The court at pages 125-126, 170 (N. E. (2) 639) said:

"Several other jurisdictions have been confronted with

> the same or analogous situations, and they have generally allowed the interest of an employer, not a party to the suit, to be introduced to show possible bias or prejudice of a witness in his employ."

The court then cites cases from other jurisdictions and says:

> "We agree with this view."

The court then stated that the employer's interest is substantial and affects the credibility of the witness. While acknowledging the fear that the jury might take this into account in computing damages, that this possibility could not operate to extinguish the right of a party to establish possible motive, bias or prejudice on the part of a witness. The court then cites the Illinois Evidence Act which provides that the interest of a witness may be shown for the purpose of affecting his credibility. It then says that under the Illinois Workmen's Compensation Act the amount of compensation paid or to be paid by an employer to an injured person must be repaid by the employee from any recovery from the negligent third party.

Referring to the above Appellate Court decision the Court of Appeals says:

> "We believe that Olson is so inconsistent with several opinions of the Supreme Court of Illinois that that decision does not reflect the law of that state. *Compare, Bryntesen* v. *Carroll Const. Co.*, 27 Ill. 2d 566, 190 N. E. 2d 315; *Rylander* v. *Chicago Short Line Ry. Co.*, 17 Ill. 2d 618, 622-628, 161 N. E. 2d 812; *O'Brien* v. *Chicago City Ry. Co.*, 305 Ill. 244, 262-263, 137 N. E. 214, 27 A. L. R. 479."

There is not a word in the cases cited by the Court of Appeals that supports the above assertion.

In *Bryntesen* v. *Carroll Const. Co.* (1963), 27 Ill. 2d 566, a suit for injuries, defendant sought to show in diminution of damages that plaintiff had recovered $8,000 of workmen's

compensation payments. Court held such evidence had been properly excluded. No employees of a party which would share in the recovery were offered as witnesses. There is not a word in the opinion contrary to *Mokrzycki* v. *Olson Rug Co.*, 28 Ill. App. 2d 117, 170 N. E. (2) 635.

In *Rylander* v. *Chicago Short Line Ry. Co.* (1959), 17 Ill. 2d 618, plaintiff recovered for injury caused by negligence of defendant in placing for loading at the plant of plaintiff's employer a defective tank car. No employee of a party entitled to share in the recovery was a witness.

There is not a word in the opinion contrary to *Mokrzycki* v. *Olson Rug Co.*, 28 Ill. App. 2d 117, 170 N. E. (2) 635.

In *O'Brien* v. *Chicago City Ry. Co.* (1922), 305 Ill. 244, plaintiff was injured by defendant's car being operated at a dangerous speed. The case was decided on the pleadings. There is nothing in it contrary to *Mokrzycki* v. *Olson Rug Co.*, 28 Ill. App. 2d 117, 125-126, 170 N. E. (2) 635.

The following cases cited by the Illinois Appellate Court in *Mokrzycki* v. *Olson Rug Co.* (1960), 28 Ill. App. 2d 117, 170 N. E. 635, sustain its ruling:

In *Christensen* v. *Pittston Stevedoring Corp.* (1954), 131 N. Y. S. 546; 283 App. Div. 1088 plaintiff, an employee of William Spenser & Sons, was injured in the course of his employment. Plaintiff recovered a judgment for $70,000 for his injuries against Pittston Stevedoring Corp.

Upon the trial, plaintiff brought in other employees of William Spenser and Sons Corp. who testified to the occurrence. On cross-examination of the foreman of plaintiff's employer, defendant offered to prove that plaintiff's employer was self-insured and that in consequence thereof was interested in the outcome of the litigation.

The court excluded this evidence of the witness employer's interest in the case. The judgment was reversed for this error.

In *Johannsen* v. *Peter Woboril, Inc.* (1952), 260 Wis. 341, 51 N. W. 2d 53, plaintiff was injured while an employee of Bucyrus Erie Co. Plaintiff received workmen's compensation from Bucyrus Erie Co. Bucyrus Erie Co. was self-insured.

Employees of plaintiff's employer testified as to the occurrence. It was assigned for error in the Supreme Court of Wisconsin that the court had denied defendant's counsel the right to bring to the attention of the jury that plaintiff's employer had an interest in the suit to recover the workman's compensation paid plaintiff as affecting the credibility of its employees who appeared as witnesses.

Held that this ruling was reversible error.

In *Majestic* v. *Louisville & N. R. Co.* (1945), 6 Cir. 147 F. 2d 621, Majestic, an employee of United States in the course of his employment was injured in a collision with defendant's locomotive. Witnesses for plaintiff who were employees of the United States were asked on cross-examination whether or not plaintiff was receiving Federal Employees Compensation and whether the United States would be entitled to recover the sums paid.

Holding that defendant had a right to show that the witnesses' employer was paying the plaintiff compensation, the court said, P. 627:

> "(18, 19) Accordingly, facts tending to show interest, bias or motive on the part of a witness may be elicited on cross-examination although such examination may necessarily disclose that the injured person or the defendant is protected by insurance." (P. 627.)

In *Springle* v. *Davis* (1940), 4 Cir. 111 F. 2d 925, plaintiff, a highway workman, was injured in the course of his employment when struck by defendant's automobile on the highway.

Plaintiff received Workmen's Compensation.

Employees of the State Highway Department testified on behalf of plaintiff upon the trial. The defendant sought to show the interest of the State Highway Department to recover the compensation paid plaintiff.

Holding that defendant was entitled to show that the employer of plaintiff's witnesses had an interest to recover workmen's compensation, the court said:

> "Under this rule, the fact that a witness is employed by a party to the suit is regarded as a relevant circumstance. Thus it appears that the interest of the Highway Department in this suit, derived from the payment of compensation was a fact which was admissible for one purpose but inadmissible for another." (P. 931.)

In *Thurber Corporation* v. *Fairchild Motor Corporation* (1959), 5 Cir., 269 F. 2d 841, witness for defendant was a consultant of Borg-Warner. Another witness for defendant was in the employ of Borg-Warner. Borg-Warner had contracted to indemnify defendant.

The court refused to permit the defendant to show the agreement under which the witnesses' employer was interested in the result of the case. For this ruling the judgment was reversed.

The Court said, Page 845:

> "'Under this rule the fact that a witness is employed by a party to the suit is regarded as relevant circumstance to be considered by the jury as showing bias or interest, and a fortiori where the witness is an employee of a party who has an interest in the recovery, his employment may be shown for the same reason.'"

In *Houfburg* v. *Kansas City Stock Yards Co. of Maine* (1955) (Mo. Supreme), 283 S. W. 2d 539, plaintiff, an employee of Producers Commission Association, recovered

a $50,000 judgment against Kansas City Stockyards for injuries suffered in the course of his employment. The judgment was reversed. Dr. Ingham had testified of plaintiff's injuries, pain and resulting disability. Defendant had offered to show (1) Ingham had made five reports to Travelers Insurance Co.; (2) Dr. Ingham had been paid by Travelers Insurance Co.; (3) that Dr. Ingham knew that if plaintiff recovered, Travelers Insurance Co. would recover the money it had paid for workmen's compensation. The trial court excluded this evidence. Holding that this evidence should be admitted on the retrial, the court said, page 548:

> "It may be conceded that the fact of payment by an insurer of workmen's compensation benefits and the consequent pro tanto subrogation of the insurer is ordinarily irrelevant in a suit of this nature and should be excluded. * * * However, this rule does not apply where it becomes necessary to make such disclosure in order that the jury may properly evaluate the testimony of a witness."

Molrozycki v. *Olson Rug Company* (1960), 28 Ill. App. 2d 117, 170 N. E. 635, is the law in Illinois.

National Enameling Company v. *Fagan* (1904), 115 Ill. App. 590. Vandeveer, an attorney, testified he took down a statement made by plaintiff and a witness for plaintiff. On cross examination over objection Vandeveer stated that in taking the statement his firm was acting for Traveler's Insurance Co. Holding the ruling proper the court said, (page 293):

> "Appellant had put an interested witness on the stand to prove a material fact, and it was perfectly proper that on cross-examination such witness should be required to disclose the fact that he was interested and in what manner."

In *West* v. *American Telephone & Telegraph* (1940), 311 U. S. 223, the 6th Circuit had declined to follow an Ohio Appellate Court decision since it believed the Ohio Supreme Court would hold otherwise. The statement by Mr. Justice Stone is applicable here (pp. 236-237):

> "But the obvious purpose of § 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.
>
> "A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

The decision of the Court of Appeals makes two divergent and conflicting rules within the State of Illinois. It was the duty of the Court of Appeals to follow the Appellate Court decision.

III.

After the jury reported a disagreement, the judge gave an instruction patterned after the instruction in *Allen* v. *U. S.* (1896), 164 U. S. 492 at 501 (Res. A. 660-663). The Court of Appeals rejected the holding in *Allen* v. *U. S.* and the other federal cases following *Allen* v. *U. S.* It held that giving the instruction containing the following language was error:

> "However, I'll say this, if much the greater number of you are in favor of a verdict either for the plaintiff or for the defendant, each dissenting juror ought to consider whether his appraisal of the evidence, of the weight of the evidence, is a correct one, since it makes no effective impression upon the minds of so many equally intelligent fellow jurors, who bear the same responsibility, who serve under the sanction of the same oath and who have heard the same evidence, with the same attention and with equal desire to arrive at the truth." (Res. A. 662-663).

The Court of Appeals held that the District judge should have told each juror being in the majority to re-examine his appraisal of the evidence in the light of the fact that a minority of their number disagreed. His failure to do this was error.

This holding creates a conflict among the Circuits. It affects the proper relations of the court to the jury. The language which the 7th Circuit says was error is substantially the same as was approved in this court in *Allen* v. *U. S.*, 164 U. S. 492 at 501. The instruction there given includes the following:

> "* * * that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the

majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. . . ."

The instruction was approved by the Fourth Circuit in *Orthopedic Equipment Co.* v. *Eutsler* (1960), 276 Fed. 2nd 455. That instruction is substantially identical to the instruction given by the District Judge. It contains specifically, the language:

> p. 462-463 ". . . If much of the larger number are of one opinion, a dissenting juror should consider whether his disagreement is a reasonable one which makes no impression upon the minds of so many jurors equally honest, equally intelligent with himself. If, upon the other hand, the majority is the other way, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority."

In *Thompson* v. *Allen* (1956), 240 F. 2d 266, the Tenth Circuit had the same question before it. It was argued that the instruction overemphasized the duty of the minority to re-examine their thinking because of the fact they were in the minority and did not equally emphasize the duty of the majority to give further consideration to the views of the minority.

The Court at Page 269 cited *Allen* v. *U. S.*, 164 U. S. 492 and affirmed the judgment.

The same question was before the 7th Circuit in 1952, *U. S.* v. *Furlong*, 194 F. 2d 1 at page 3. The instruction there approved contained the language which the Court of Appeals in this case has condemned. There was a part of the instruction in this latter case that was not taken from *Allen* v. *U. S.* which the court disapproved.

The decision of the 7th Circuit on the jury question creates conflict among the Circuits. It is desirable to have

uniformity in the several Circuits in the relation of the judge to the jury.

If the ruling in *Allen* v. *U. S.* is to be changed it should be by decision of this court.

CONCLUSION.

This court should grant certiorari and construe Rule 36 and eliminate the conflict between the Circuits. It is essential that the rule should be properly applied for the administration of justice.

This court should also construe Rule 11 in its relation to Rule 36 as to an attorney omitting from his complaint the sole charge on which he expects to rely on the trial.

This court should take jurisdiction to prevent a conflict of the law in Illinois in personal injury cases where the plaintiff has collected workman's compensation and seeks to use employees of his employer as witnesses.

The holding of the Court of Appeals contrary to this court's decision in *Allen* v. *U. S.* and the decisions of the other Circuits and the prior decision of the 7th Circuit can only create confusion as to the relation of the court to the jury.

We respectfully submit that a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

No. 14738

EUGENE MANGAN,
Plaintiff-Appellant,

v.

BRODERICK AND BASCOM ROPE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 27, 1965

Before HASTING, *Chief Judge,* DUFFY, *Circuit Judge,* and MERCER, *District Judge.*

MERCER, *District Judge.* Plaintiff, Eugene Mangan, filed his suit against the defendant for damages for personal injury. He prosecutes this appeal to review a judgment entered by the court below upon a verdict rendered by a jury finding the issues for the defendant. The action of the trial judge in refusing to permit plaintiff to read certain requests for admissions to the jury and other allegations of trial error are asserted as the basis for plaintiff's contention that the judgment should be reversed and the cause remanded to the court below for a new trial.

On and prior to December 1, 1960, plaintiff was an employee of Schweitzer & Company which was then engaged in the construction of a concourse building at O'Hare Field. For some five weeks prior to the occurrence which gave rise to this suit the crew of which plaintiff was a part had been engaged in the installation of precast concrete panels used in the construction of the walls of the building. The panels, which weighed from 3000 to 3500 pounds each, were lifted by a crane to the second floor of the building where they were fitted into bays in the building wall. Each bay held four panels. Limited clearance within the bays required that a sling method be used to install the number 4 panel in each bay, although other means were used to lift the first 3 panels into place. A sling was fashioned from wire rope, or cable, wrapped around the concrete panel and wood softeners used to guard the panel from damage by the cable. In each such operation, the sling was rigged securely around a panel and the hook on the crane was fastened on the outside of the wire sling thus formed. The panel would then be lifted into the air in a vertical position to a height of about 4 or 5 feet. At that point, the ground men on the project attached a manila guide line to the cable which men working on the second floor manipulated as the panel was raised to guide the panel into place.

Schweitzer used one-quarter inch cable as slings on the number 4 panels. Each cable could be used for approximately 6 to 8 times before it was worn to such extent that replacement was necessary. At the start of the project one-quarter inch 6 x 19 cable was used for the sling.[1]

[1] Wire rope, or cable, is designated in the trade by the diameter of the cable and a numerical designation of the number of strands in the cable and the number of wires in each strand. Thus 6 x 19 cable is cable having six strands with nineteen wires in each strand. Other cable strengths are similarly designated in this opinion without specific description thereof.

The evidence indicates that all wire cable of the same diameter

About the middle of November, 1960, Schweitzer's supervisory employees decided to order some one-quarter incl. 6 x 37 cable because they felt its greater flexibility would give more ease of handling and better wearing quality. The job superintendent directed Schweitzer's timekeeper to order some 6 x 37 cable from the defendant. That order was placed by phone to defendant's warehouse on November 14, 1960, for 50 feet of 6 x 37 cable. A sales trainee at defendant's warehouse obtained a coil of cable from the warehouse and delivered it to the "little shed" at the concourse project. Schweitzer's timekeeper receipted for the delivery.

On December 1, 1960, the job superintendent sent the plaintiff to the iron worker's shanty where cable was stored to obtain some cable to replace the one being used for the sling. Plaintiff testified that he found a coil of new cable hanging in the shanty and that it was the only cable that was in the shanty which had not been used. The cable was then made into a sling around a number 4 panel in the manner above described, and the crane operator lifted the panel to a height of about five feet to the proper position for attachment of the guide lines. While plaintiff and another employee were tying the ends of the guide line to the sling, the cable broke and the panel fell striking the plaintiff and injuring him seriously and permanently.

Plaintiff's foreman arrived at the scene before plaintiff was removed to the hospital and saw the sling cable lying on the ground broken. Thereafter, he and Schweitzer's job supervisor examined the cable and upon counting the strands discovered that it was 6 x 7 cable. Schweitzer's supervisory employees testified that no one-quarter inch 6 x 7 cable had ever been ordered by them for the O'Hare

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is identical in appearance. The only way to distinguish one-quarter inch 6 x 19 cable from one-quarter inch 6 x 7 cable is to take one of the strands apart and count the number of wires therein.

project, and that no cable of such composition was ever used on the project. Subsequent laboratory tests of the broken cable showed it to be one-quarter inch in diameter and consisting of six strands, with each strand made up of seven wires wound around a hemp center. The test revealed that the breaking strength of the cable was about 2330 pounds.

Schweitzer's job superintendent testified that he was familiar with the cable stored in the ironworker's shanty; that 50 feet of 6 x 19 quarter-inch cable had been received from another supplier on November 3, 1960, and that all such cable had been used prior to December 1, 1960; that for a period of some 10 days prior to December 1 there was only one piece of new and unused cable in the shanty; and that the cable was in a coil the way it had been received, and that the coil was 50 feet in length. He further testified that he had examined all cable on the concourse job on December 2, 1960, and that he could find no 6 x 37 cable on the job, either new or used.

Plaintiff's complaint charged that his injury came as a proximate result of defendant's negligence, among other things, in supplying a cable of inferior strength and different from the one that had been ordered, in selling a cable which was unfit for the purpose for which it was ordered, and in failing to warn plaintiff that the cable was unfit for the purpose for which it was intended.

We turn first to the alleged error in the court's refusal to permit plaintiff's requests for admissions to be read to the jury. On August 23, 1962, plaintiff filed 14 requests for admissions of fact which, so far as here pertinent, requested admissions that Schweitzer had ordered 6 x 37 wire rope from defendant, that wire rope was delivered by the defendant to Schweitzer pursuant to that order prior to December 1, 1960, and that, "the wire rope sent Wm. E. Schweitzer and Co. was composed of 6 strands

with seven wires in each, or 6 x 7 wire rope". The requests above summarized were requests numbered 1 and 4. The request above quoted was request number 5. Thereafter on September 4, 1962, defendant filed a motion praying that it be relieved from answering plaintiff's requests numbered 11, 12, 13 and 14, and that an order be entered extending the time within which defendant could answer the balance of the requests for admissions. On September 10, 1962, defendant moved for a hearing on its objections to requests numbered 11 to 14. Judge Hoffman entered an order sustaining defendant's objections to those requests. Defendant did not seek or obtain a ruling on that portion of its motion requesting an extension of time to answer the balance of the admissions, and defendant did not, in fact, at any time deny or otherwise answer plaintiff's requests numbered 1 through 10. That was the situation prevailing at the time when the cause went to trial.

At the outset of the trial, plaintiff sought to read his requests numbered 1 through 10 to the jury. Upon the representation of defendant's counsel that objections to all requests filed by the plaintiff had been sustained, the court asked plaintiff to pass the matter of the admissions until the record could be checked. During the course of the trial, several other discussions between court and counsel were had relative to use of those requests. Ultimately, the trial judge indicated his opinion that defendant's failure to respond to the requests would be tantamount to admission of the facts therein stated, but that plaintiff had abandoned his requests by his subsequent filing of interrogatories addressed to the same subject matter.

That ruling was error. A party's failure to file a verified response to requests for admissions under Rule 36 admits the truth of all matters therein stated, *Water*

Hammer Arrester Corp. v. *Tower,* 7 Cir., 171 F. 2d 877, 879, *Adventures in Good Eating* v. *Best Places to Eat,* 7 Cir., 131 F. 2d 809, *O'Campo* v. *Hardesty,* 9 Cir., 262 F. 2d 621, and unanswered requests are not abandoned by the subsequent filing of interrogatories addressed to the same subject. *Woods* v. *Robb,* 5 Cir., 171 F. 2d 539. Where no response is made to requests for admissions, the party making the requests is entitled to rely thereupon and no further proof is required to be made of the facts thus admitted. *Water Hammer Arrester Corp.* v. *Tower, supra.*

That error alone would require reversal of this judgment. Plaintiff advised the court below that his trial preparation was made on the theory that these unanswered requests would stand admitted. The exclusion of those facts from evidence may well have made the difference between a verdict for the plaintiff and the verdict rendered.

There is absolutely no merit to defendant's contention that the request was deficient because it did not fix a time within which defendant's response thereto was required. Defendant did not object to the sufficiency of the requests in the trial court. It cannot now object to the form of the request. Rule 36 places the burden upon a party to whom requests are directed to take some affirmative action, either by response to the requests or by objecting thereto if any ground he has. *Water Hammer Arrester Corp.* v. *Tower, supra.* Having done nothing as to requests 1 to 10, inclusive, defendant must bear the consequences of their standing admitted.

Reversal of the judgment is also required because evidence of workmen's compensation benefits was injected into the case. Immediately prior to the commencement of the trial, the trial judge expressed his general view that such evidence would not be admitted, though he reserved his final ruling thereon. He told defense counsel

to refrain from such inquiry until a ruling was made by the court. Notwithstanding that admonition, defendant's counsel sought to ask Schweitzer's office manager if compensation had been paid to plaintiff and if Schweitzer would recover substantial sums if plaintiff was successful in this suit. Objections to those questions were sustained, and defendant's offer of proof was denied. Subsequently, in his examination of one of the treating physicians, counsel asked the physician who had paid plaintiff's bill and elicited the answer that the insurance company had done so. The question and answer were stricken. Though the court chastised counsel for his deliberate disobedience to the court's prior admonition, plaintiff's motion for a mistrial was denied.

Later, in the trial, but yet prior to the court's ruling on admissibility, counsel for defendant posed similar questions to the witness Borchardt. Ultimately, in apparent reliance upon *Mokrzycki* v. *Olson Rug Co.*, 28 Ill. App. 2d 117, 170 N. E. 2d 635 the court allowed Borchardt to be cross-examined relative to the workmen's compensation situation and allowed defendant to show through Borchardt that a workmen's compensation claim against Schweitzer was then pending before the Illinois Industrial Commission. The court below reasoned that such cross-examination was proper to show the possible prejudice and bias of the witness as an employee of Schweitzer.

This court, among others, has stated that testimony of that nature is highly prejudicial to a plaintiff's case E. g., *Eichel* v. *New York C. R. Co.*, 375 U. S. 253, 84 S. Ct. 316, 11 L. Ed. 2d 307; *Tipton* v. *Socony Mobil Co.*, 375 U. S. 34, 84 S. Ct. 1, 11 L. Ed. 2d 4; *Goldman* v. *Checker Cab Co.*, 7 Cir., 325 F. 2d 853, 856; *Bryntesen* v. *Carroll Const. Co.*, 22 Ill. 2d 63, 174 N. E. 2d 172; *O'Brien* v. *Chicago City Ry. Co.*, 305 Ill. 244, 262, 137 N. E. 214, 27 A. L. R. 479; *Burnett* v. *Hernandez*, 9 Cir., 263 F. 2d 212. Cf., *King* v.

Grimm, 7 Cir., 300 F. 2d 658, 660. Unless such evidence has some legitimate purpose other than to advise the jury that a plaintiff has been partly paid for his injury, a strict exclusionary rule should be applied.

In the case, the conduct of defendant's counsel in his cross-examination of Schweitzer's office manager, the doctor and Borchardt in defiance of the court's admonition was an act not to be condoned. The motive for such questioning could not have been entirely an attempt to show possible bias of the witnesses. The doctor was not a Schweitzer employee. He could have no possible interest in the case. Borchardt was not a Schweitzer employee as we shall presently show. Thus, even if the judge was correct in his ultimate ruling that evidence of the receipt of workmen's compensation might be adduced to show the possible bias of witnesses, we are still faced here with gross error. Counsel's willingness to inject that evidence into the case at any cost is sufficient to earn him a new trial for plaintiff.

The cross-examination of Borchardt which the court permitted must be reviewed in a different light. In the *Olson* case, the plaintiff, an employee of Globe, was injured while unloading a boxcar which he alleged Olson had negligently loaded. The court held that cross-examination of Globe's plant superintendent relative to Globe's interest in plaintiff's suit because of workmen's compensation benefits paid to plaintiff was permissible for the limited purpose of showing the possible bias of the Globe employee as a witness. *Mokrzycki* v. *Olson Rug Co.*, 28 Ill. App. 2d 117, 125-127, 170 N. E. 2d 635.

We believe that *Olson* is so inconsistent with several opinions of the Supreme Court of Illinois that that decision does not reflect the law of that state. *Compare, Brynsteseu* v. *Carroll Const. Co.*, 27 Ill. 2d 566, 190 NE 2d 315; *Rylander* v. *Chicago Short Line Ry. Co.*, 17 Ill. 2d 618,

622-628, 161 NE 2d 812; *O'Brien* v. *Chicago City Ry. Co.*, 305 Ill. 244, 262-263, 137 NE 214, 27 A. L. R. 479.

The rationale of *Olson* is that every employee witness is suspect if his employer may possibly have a lienable interest in any recovery by a fellow employee against a third-party tort-feasor. To us that is sheer folly. Though we cannot always discern the motives of men, we cannot conclude that every salaried employee is likely to testify falsely to enhance the chances of his employer's claim for money. Any slight value which such evidence might have in discrediting a witness is far outweighed by the likelihood that such evidence will be misused by a jury. *Tipton* v. *Socony Mobile Oil Co.*, 375 U. S. 34, 84 S. Ct. 1, 11 L. Ed. 2d 4; *Eichel* v. *New York C.R. Co.*, 375 U. S. 253, 84 S. Ct. 316; *Burnett* v. *Hernandez*, 9 Cir., 263 F. 2d 212. Indeed, we can conceive of few instances in which the value of such evidence would merit the effort of its producement if the evidence did not at the same time advise the jury that the plaintiff had already collected some money for his injury. As one court pointed out the "smell" of insurance or workmen's compensation must be presumed to affect a jury adversely to a plaintiff's cause. *Burnett* v. *Hernandez*, 9 Cir., 263 F. 2d 212, 214.

Though we can conceive of instances in which the compensation factor might have the effect of discrediting a witness, we think that the use of such evidence should be limited to instances in which possible bias is revealed by some act or factor more profound than the mere fact of employment by a particular employer.

We are, therefore, constrained to disagree with the *Olson* opinion.

In any event, the cross-examination of Borchardt relative to Schweitzer's compensation was error irrespective of the status of *Olson* as authority. Borchardt was not

a Schweitzer employee. He was employed by Martin Boyer Company, an investigator employed by Schweitzer to process its workmen's compensation claims. There is nothing to indicate that the salary of Borchardt or the fees of Boyer were in any way affected by the Schweitzer lien claim. Borchardt was permitted to testify that plaintiff had a suit pending against Schweitzer before the Illinois Industrial Commission. The jury may well have implied from that testimony that plaintiff was alleging that Schweitzer had been negligent and that, therefore, plaintiff could not recover from defendant.[2] The testimony had no possible tendency to discredit the witness. Its only tendency was to prejudice plaintiff's rights.

Though it is not likely to recur on a new trial of this case, we think one other aspect of this appeal should be briefly mentioned. After the jury had deliberated for some six hours, the jurors were permitted to separate and to go to their homes for the night. Shortly after they met on the following morning, the court gave the jury an additional charge which tended, among other things, to tell each of the jurors being in the minority on the panel to re-examine his appraisal of the evidence in the light of the fact that a majority of their number, who were equally intelligent people disagreed.[3] We think

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[2] That hypothesis is contrary to the established rule of law that the negligence of an employer is not imputable to his employee in a suit against a third person. *Giguere* v. *United States Steel Corp.*, 7 Cir., 262 F. 2d 189; *Rylander* v. *Chicago Short Line Ry. Co.*, 17 Ill. 2d 618, 161 N. E. 2d 812.

[3] The court told the jury, in part:

"Now, I don't know how this jury stands as between those who may be at this moment in favor of the plaintiff or in favor of the defendant, and I don't want to know.

"However, I'll say this, if much the greater number of you are in favor of a verdict either for the plaintiff or for the defendant, each dissenting juror ought to consider whether his appraisal of the evidence, of the weight of the evidence, is a correct one, since it makes no effective impression upon the minds of so many equally

it error to so charge a jury unless a like admonition, equally specific, is likewise addressed to those jurors holding a majority view of the evidence.[4]

Finally, the conduct of defendant's counsel in cross-examining a witness upon an exhibit which was not in evidence and which was never offered in evidence was such a deliberate misuse of the judicial process that it must not be repeated upon a retrial of this suit.

We have considered and rejected all of the defendant's arguments for affirmance which are not specifically mentioned herein.

For the reasons above stated, the judgment is reversed and the cause is remanded to the court below for a new trial.

REVERSED AND REMANDED.

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intelligent fellow jurors, who bear the same responsibility, who serve under the sanction of the same oath and who have heard the same evidence, with the same attention and with equal desire to arrive at the truth."

[4] A similar instruction has been held to be improper. E. g., *Acunto* v. *Equitable Life Assur. Soc.*, 270 App. Div. 386, 60 N. Y. S. 2d 101, *Lennox* v. *White*, 133 W. Va. 1, W. Va., 54 S. E. 2d 8, and *Mead* v. *City of Richland Center*, 237 Wis. 537, 297 N. W. 419.

APPENDIX B.

JUDGMENT BELOW.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.
Chicago, Illinois 60610.

Tuesday, July 27, 1965.

Before

Hon. John S. Hastings, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Fredrick O. Mercer, District Judge.

EUGENE MANGAN,
No. 14738 vs.
BRODERICK AND BASCOM ROPE COMPANY.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and the same is hereby remanded to the said District Court for a new trial in accordance with the opinion of this court filed this day.